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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 153

ELEANOR TAFT TILTON, ET AL., APPELLANTS

v.

ELLIOT L. RICHARDSON, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, TERREL H. BELL, ACTING COMMISSIONER OF EDUCATION OF THE UNITED STATES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR APPELLEES RICHARDSON AND BELL

OPINION BELOW

The opinion of the three-judge district court (App. 37–67) is reported at 312 F. Supp. 1191.

JURISDICTION

The judgment of the district court was entered on March 19, 1970 (App. 68). The notice of appeal was filed on April 8, 1970 (App. 68). This Court noted probable jurisdiction on June 22, 1970. 399 U.S. 904. The jurisdiction of this Court rests on 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether Title I of the Higher Education Facilities Act authorizes construction grants to church-related colleges and universities that are eligible to receive them.

2. Whether, if such grants are authorized, the inclusion of church-related colleges and universities as recipients of construction grants for academic facilities on an equal basis with other private and public colleges and universities violates the Establishment Clause or the Free Exercise Clause of the First Amendment.

STATUTE INVOLVED

The major provisions of Title I of the Higher Education Facilities Act of 1963, Pub. L. 88–204, 77 Stat. 363, 20 U.S.C. 701–758, are reproduced as an appendix to appellants' brief.

STATEMENT

This suit presents the question of the validity of aid to church-related colleges and universities under Title I of the Higher Education Facilities Act of 1963, Pub. L. 88–204, 77 Stat. 363, 20 U.S.C. 701–758. Title I provides for grants to assist in construction of certain types of undergraduate academic facilities. 20 U.S.C. 711–712. Appellants are citizens and taxpayers who contend that grants to certain church-related institutions of higher education are not authorized by the Act and violate the Establishment and Free Exercise Clauses of the First Amendment. A three-judge court, convened under 28 U.S.C. 2282 and 2284, rejected

these claims, denied injunctive relief and dismissed the action (App. 67–68).

THE STATUTORY FRAMEWORK

The Higher Education Facilities Act was passed in response to widespread concern over the ability of colleges and universities to expand "to accommodate rapidly growing numbers of youth who aspire to a higher education." 20 U.S.C. 701. It authorizes grants and loans for the construction of undergraduate and graduate academic facilities.

A project is eligible for construction funds[1] under Title I only if it will "result in an urgently needed substantial expansion of the institution's student enrollment capacity, capacity to provide needed health care to students or personnel of the institution, or capacity to carry out extension and continuing education programs on the campus of such institution * * *." 20 U.S.C. (Supp. V) 716.[2] The Commissioner of Education is authorized to prescribe the basic criteria governing construction projects under Title I[3] and is instructed to "give special consideration to expansion of undergraduate enrollment capacity * * *." 20 U.S.C. 717 (a). Priorities among projects are established by state agencies which submit them to the Commissioner of Education for his approval. 20 U.S.C. 715, 719.

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[1] Under Title I, the federal grant may not exceed 50 percent of the cost of the project. 20 U.S.C. (Supp. V) 717(b).

[2] Funds may also be provided to new institutions for creation of urgently needed enrollment capacity. 20 U.S.C. 716.

[3] For the regulatory procedure and criteria, see 45 C.F.R. 170.11–170.19.

The term "academic facilities" is defined to include "structures suitable for use as classrooms, laboratories, libraries, and related facilities necessary or appropriate for instruction of students, or for research, or for administration of the educational or research programs * * * and maintenance, storage, or utility facilities essential to operation of the foregoing facilities * * *." 20 U.S.C. 751(a)(1).[4] The definition specifically excludes "any facility used or to be used for sectarian instruction or as a place of religious worship" or "any facility which (although not a facility described in the preceding clause) is used or to be used primarily in connection with any part of the program of a school or department of divinity * * *." 20 U.S.C. 751(a)(2).[5]

Colleges and universities applying for funds are advised that no part of the project may be used for sectarian instruction, religious worship, or the programs of a divinity school at any time (App. 80) and they must provide assurances to this effect (App. 87–89). Both the state commission and the federal Office of Education review the eligibility of applications on these grounds (App. 80–81, 84–86).

The United States retains a twenty-year interest in any facility constructed with Title I funds. If during this period the applicant ceases to be a public

[4] For purposes of Title I, the term also includes infirmary facilities.

[5] A "school or department of divinity" is defined as "an institution, or a department or branch of an institution, whose program is specifically for the education of students to prepare them to become ministers of religion or to enter upon some other religious vocation or to prepare them to teach theological subjects." 20 U.S.C. 751(a)(2).

or other nonprofit institution of higher education or the facility is used other than as an "academic facility," the United States is entitled to recover an amount equal to the proportion of its present value which the federal grant bore to the original cost of the facility. 20 U.S.C. 754(b). During the twenty years, the Office of Education attempts to insure that facilities are used in the manner required by the Act primarily by on-site inspections (App. 82–84).

THE PROCEEDINGS BELOW

Appellants brought suit against federal and state officials who administer the Act and four church-related colleges and universities in Connecticut who received construction grants (App. 7–15, 28–36). Funds were used for five projects: (1) a library at Sacred Heart University; (2) a music, drama and arts building at Annhurst College; (3) a science building at Fairfield University; (4) a laboratory at Albertus Magnus College (App. 11–12, 32–33).[4]

Appellants contended that the Act did not authorize grants to these colleges and that, if it did, the Act was unconstitutional. A three-judge court was properly convened and held a plenary hearing on appellants' claims.

Appellants' central contention was that construction grants to "sectarian" institutions, that is, those for

[4] The federal shares were approximately 33 percent (Sacred Heart); 23 percent (Annhurst); eight percent and 34 percent (Fairfield); and one and one-half percent (Albertus Magnus). See App. 11–12.

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which "the propagation, teaching or practice of religion is a meaningful and major part of [their] existence" (Appellants' Brief 7), would violate the Establishment Clause. Cf. *Horace Mann League* v. *Board of Public Works*, 242 Md. 645, 220 A. 2d 51, certiorari denied, 385 U.S. 97. They sought to prove that the four recipient institutions were "sectarian" by introducing voluminous evidence on their relations with religious authorities, the doctrine subscribed to by their personnel, the content of their curricula, and numerous other matters pertaining to their "character."

Appellees' position was that the grants were constitutional so long as the Act and its implementation insured that only the secular, in contrast to the religious, functions of church-related institutions were aided. Stipulations were introduced which detailed the process by which grants are screened, awarded and reviewed (App. 69–91) and the activities of the Connecticut commission which establishes priorities among projects (App. 92–101). Appellee colleges and universities introduced testimony that they had complied fully with the prohibition on the use of federally financed facilities for religious purposes and their religious affiliation did not interfere with the performance of their secular functions (see, *e.g.*, App. 102, 105–106, 108, 110, 115, 118, 120–121).

The district court held that "Congress intended to make the benefits of the Act available to church-related colleges and universities" (App. 43) and re-

jected the argument that the Act violated the Establishment Clause simply because it provided aid to allegedly "sectarian" institutions. Applying this Court's "purpose and effect" test, see p. 16, *infra*, the court further held that "the Act has the secular purpose of increasing the student enrollment capacity of the Nation's institutions of higher education—an existing urgent public need—and that the Act does not have the purpose of promoting religion of any kind" (App. 49).

Recognizing the diverse functions performed by church-related colleges and universities (App. 49–50) and the careful distinction between sectarian and secular facilities made by the Act and maintained in its implementation (App. 50–51), the court found that all the challenged facilities were used "solely for non-religious purposes" (App. 61–66). It concluded, therefore, that the primary effect of the statute was neither to advance nor inhibit religion (App. 51). Finally, because there was no showing that the statute coerced appellants in the practice of their religion, the district court rejected their claim that the Act violated their rights under the Free Exercise Clause (App. 51–52).

SUMMARY OF ARGUMENT

I

Title I of the Higher Education Facilities Act authorizes assistance to church-related colleges and universities for construction of certain academic facilities to be used for secular instruction. The Act

provides grants and loans to qualified "institutions of higher education," without reference to religious affiliation. Extensive discussion in Congress prior to passage of the Act shows it intended to make church-related institutions eligible for assistance under the Act. Rather than exclude church-related institutions, the Act prohibits religious uses of facilities which are partly financed with federal funds.

II

The Act is a governmentally neutral measure which violates neither the Establishment nor Free Exercise Clause. The standard which this Court has adopted for determining whether an enactment violates the Establishment Clause is the "purpose and primary effect" test. The Higher Education Facilities Act has the secular purpose of assisting institutions of higher learning to provide quality education to a rapidly increasing number of students. Congress concluded that church-related institutions provide an adequate secular education and that the need to accommodate more students could not easily be met without permitting qualified church-related colleges and universities to receive assistance under the Act.

The primary effect of the Act is to achieve the goal of providing a secular education. Assistance is provided only for academic facilities to be used in secular instruction. Religion does not permeate the process of secular instruction at the college and graduate level to such an extent that secular and religious functions cannot be treated separately.

The administrative controls designed to insure that academic facilities are not used for prohibited religious purposes do not involve government excessively in the affairs of the church-related colleges and universities which receive assistance. However, the alternative method of insuring that federal funds are not used for religious purposes which appellants suggest—a case-by-case examination of the institution to determine whether it is "sectarian"—would result in the excessive entanglements in the affairs of church-related institutions against which this Court has warned.

The Act, finally, does not violate appellants' rights under the Free Exercise Clause for there is no coercion of religious belief and practice. In fact, by including church-related colleges and universities in the Act, Congress has furthered the values fostered by the Free Exercise and Equal Protection Clauses, while achieving an important public goal.

ARGUMENT

I.

THE HIGHER EDUCATION FACILITIES ACT AUTHORIZES GRANTS TO CHURCH-RELATED COLLEGES AND UNIVERSITIES IN COMMON WITH OTHER PRIVATE AND PUBLIC INSTITUTIONS OF HIGHER EDUCATION

A. THE LANGUAGE OF THE ACT INDICATES AN INTENT TO PRECLUDE AID TO RELIGIOUS FUNCTIONS BUT NOT TO EXCEPT CHURCH-RELATED COLLEGES AND UNIVERSITIES

Congress defined "institutions of higher education," which were to receive assistance under the Act, in an

inclusive, religiously neutral manner. It specified various conditions, among them that the institutions be public or nonprofit, legally authorized by the State to conduct their program and nationally accredited, 20 U.S.C. 751(f), but made no reference to their religious affiliation or non-affiliation.

Congress did expressly provide that facilities constructed with federal funds could not be used for religious purposes, 20 U.S.C. 751(a)(2)(C), (D). Had it desired also to exclude church-related institutions as a whole from the benefits of the Act, it would similarly have done so expressly. In fact, exclusion of religious uses apparently was considered an alternative to complete exclusion of church-related institutions as a means of meeting the requirements of the Establishment Clause. See 109 Cong. Rec. 19218.

B. THE LEGISLATIVE HISTORY OF THE ACT SHOWS THAT CONGRESS INTENDED TO INCLUDE CHURCH-RELATED COLLEGES AND UNIVERSITIES

Congress conducted extensive hearings [7] and debates prior to passage of the Higher Education Facilities Act in 1963. It was acutely aware of the urgent need for immediate growth in the enrollment capacity of the nation's colleges and universities and concluded that the need could best be met by providing aid to

[7] See *Hearings Before the House Committee on Education and Labor on H.R. 3000 and Similar Bills to Strengthen and Improve Educational Opportunities in the Nation*, 88th Cong., 1st Sess. (hereinafter cited as *House Hearings*); *Hearings Before the Senate Subcommittee on Education of the Committee on Labor and Public Welfare on S. 8, S. 580, S. Res. 70 and others*, 88th Cong., 1st Sess.

all qualified institutions of higher education, regardless of their religious affiliation.

It was estimated that college enrollment would increase from 3.6 million in 1960 to 7 million in 1970 (S. Rep. No. 557, 88th Cong., 1st Sess., p. 2) and to 8.6 million by 1975. *House Hearings,* 478. Existing facilities were inadequate even for 1963 enrollment. Approximately eleven percent needed replacement, while another eight percent required rehabilitation, to meet current standards. 109 Cong Rec. 14953. Fewer than 100 institutions had adequate library facilities. 109 Cong. Rec. 14955; see, also, *House Hearings,* 560. Only five percent of all campus libraries could seat more than one-sixth of their potential users. 109 Cong. Rec. 19403.

Replacement or renovation of existing facilities would require approximately $12.9 billion by 1970. 109 Cong. Rec. 14953. To accommodate the projected increase in enrollment would require $23 billion for new facilities, more than three times the amount spent on buildings in the 1950's. 109 Cong. Rec. 14965. By 1980, it would be necessary to double the size of every existing college and university in the United States and in addition to establish 1,000 new institutions with an average enrollment of 2,500 students. 109 Cong. Rec. 19217.

Annual expenditures from the traditional sources of college and university revenue—endowment, tuition, grants, alumni contributions and state aid—were expected to be fully one billion dollars a year less than would be needed for new facilities. Congress therefore drew the obvious conclusion that a "gap

remains * * * which the Federal Government * * * in recognition of the importance of higher education to our security and welfare, must necessarily fill." 109 Cong. Rec. 14965. It was equally apparent that a program of aid to public institutions alone would not suffice, for "public institutions are insufficient in number to handle the load of students at the college and graduate levels." 109 Cong. Rec. 14954. Senator Ribicoff predicted, for example, that "if we swept away the opportunity for the growth of our private colleges, be they sectarian or nonsectarian, there would be a fantastic collapse of education in the United States," *id.* at 19495. See also *id.* at 14963, 14973, 14955, 19890; *House Hearings*, 311, 537.[8]

A number of factors make it clear that Congress, when it decided to include private colleges and universities among the Act's beneficiaries, intended to include those which were church-related, as well as those

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[8] There were 2,100 institutions of higher learning in the United States in 1962. Of these, 1,357 were privately controlled (515 independent, 842 church-related) and 743 were public. 109 Cong. Rec. 14954. The percentage of degree-granting institutions which are private is even greater. *House Hearings*, 311. The majority of church-related institutions were affiliated with Protestant denominations, a sizable minority with the Catholic church, and a handful with other faiths.

A study of church-sponsored institutions sponsored by the Danforth Foundation revealed that in 1965 they had an enrollment of slightly more than one million, one-sixth the total number enrolled in institutions of higher learning. Church-sponsored institutions awarded approximately one-fourth of the degrees conferred. Pattillo & MacKenzie, *Church-Sponsored Higher Education in the United States* 26 (1966).

which were not. Although there was much debate on the wisdom and constitutionality of aid to church-related institutions (see, *e.g.*, 109 Cong. Rec. 14945, 14963, 19218, 19381–84, 19400–01, 19467–81, 19483–84, 19488, 19494–95, 19877–88, 19879, 19887–88), the clear indication was that the Act included them. Sponsors of the measure so stated (*e.g., id.* at 14954 (Rep. Powell), 14963 (Rep. Quie), 19218 (Sen. Morse)) and amendments designed to exclude them were proposed and rejected in both the House and Senate. *Id.* at 14990–92, 19496. The Senate bill permitted grants for construction only of libraries and buildings for natural and physical sciences and engineering in the belief that assistance to church-related institutions which was limited to these types of facilities could more easily be defended against constitutional attack. 109 Cong. Rec. 19218, 19401.[9] Finally, the express prohibition on religious uses of facilities would have been largely unnecessary if the expectation had been that church-related institutions were to be completely excluded.

C. THERE IS NO OCCASION FOR A LIMITING CONSTRUCTION

In the face of strong evidence in the language and legislative history of the Act that Congress intended

[9] The final bill was a compromise which permitted assistance for construction of libraries and facilities for only the natural sciences, mathematics, modern foreign languages and engineering. H. Conf. Rep. No. 884, 88th Cong., 1st Sess. in 1963 U.S. Code Cong. & Admin. News 1199–1200. These categorical restrictions were subsequently eliminated by amendment. Pub. L. 89–329, § 701(a), 79 Stat. 1266.

to permit grants to church-related institutions, appellants seize on the fact that Congress did not expressly include them to suggest that this Court should construe the Act to exclude them "in the candid service of avoiding a serious constitutional doubt." *United States* v. *Rumely,* 345 U.S. 41, 47. As we show below, the doubts as to the constitutionality of this statute are insufficient to warrant invoking this doctrine. Moreover, a limiting construction would be inappropriate in this case because it is "barred by intellectual honesty." *Ibid.*

Congress' decision to include church-related institutions was well-considered and unambiguous. It had debated the constitutionality and wisdom of aid to church-related colleges and universities in previous sessions. A broader bill had failed of passage the preceding year. When the 1963 bill was proposed, the issues were extensively debated and the facts and opinions of experts were thoroughly explored.[10] Congress developed a narrowly drawn program to meet the pressing problems created by inadequate facilities and expanding enrollment. Aware of possible constitutional problems, it made a deliberate decision to exclude no class of institutions of higher education from that program, and instead developed appropriate

[10] There is thus no support for a limiting construction on the theory that this judicial technique is an appropriate means to provide Congress with the opportunity for sober reconsideration of a decision made in the first instance without "full and measured thought." Freund, *The Supreme Court of the United States* 180 (1961); see *Bickel, The Least Dangerous Branch* 165-166 (1962).

safeguards, such as the prohibition on religious uses, to avoid these problems.[11]

II

THE HIGHER EDUCATION FACILITIES ACT IS A GOVERNMENTALLY NEUTRAL MEASURE WHICH PROMOTES VALID PUBLIC POLICIES WITHOUT VIOLATING EITHER THE ESTABLISHMENT OR FREE EXERCISE CLAUSE

The combined effect of the Establishment and Free Exercise Clauses—"both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other," *Walz* v. *Tax Commission*, 397 U.S. 664, 668–669—is to forbid government favoritism or hostility toward religion but also to afford a measure of discretion for action which affects religion without unduly impinging upon the values protected by the Religion[s] Clauses. "The general principle * * * is * * * that we will not tolerate either governmentally established religion or government interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality." *Id.* at 669. See *Zorach* v. *Clauson*, 343 U.S. 306, 314. The Higher Education Facilities Act is a careful and proper exercise of the discretion permitted by the Religion[s] Clauses through which Congress has sought

[11] It was felt that the "bricks and mortar" approach of the bill would itself lessen constitutional doubt since buildings and other facilities are quite neutral forms of assistance which do not easily or successfully lend themselves to the blending of secular and religious aspects of church-related education. See 109 Cong. Rec. 14955.

to achieve the important goal of enlarging the enrollment capacity of this nation's colleges and universities, while maintaining a "benevolent neutrality" toward religion.

A. THE ACT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE BECAUSE ITS PURPOSE AND PRIMARY EFFECT ARE SECULAR

The standard which this Court has adopted to determine whether various involvements of government with religion violate the Establishment Clause is the "purpose and effect" test. *E.g., McGowan* v. *Maryland,* 366 U.S. 420; *Abington School Dist.* v. *Schempp,* 374 U.S. 203; *Board of Education* v. *Allen,* 392 U.S. 236, 243. See, also, Valente, *Aid To Church-Related Education—New Directions Without Dogma,* 55 Va. L. Rev. 579, 585–587 (1969). The statement of the test which was articulated in *Schempp,* 374 U.S. at 222, was recently reiterated by this Court in the context of state financial aid to church-related schools in *Allen,* 392 U.S. at 243:

> "[W]hat are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and primary effect that neither advances nor inhibits religion. * * *"

This test was properly applied by the court below.

1. The Purpose of the Act Is to Assist Construction of Needed Facilities for Secular Instruction

There can be no serious dispute that Congress' purpose in passing the Higher Education Facilities Act was secular. The findings and declaration of policy of the Act indicated Congress' view that "the security and welfare of the United States require that this and future generations of American youth be assured ample opportunity for the fullest development of their intellectual capacities, and that this opportunity will be jeopardized unless the Nation's colleges and universities are encouraged and assisted in their efforts to accommodate rapidly growing numbers of youth who aspire to a higher education." 20 U.S.C. 701.

Congress was aware of the large number of private and church-related colleges and universities without which the urgent need for growth could not easily be met.[12] It was also aware of the important secular role these institutions have traditionally played in training of technical and professional personnel and the development of an educated citizenry. It purposely

[12] That the secular goal of Title I could not easily be met without participation by church-related institutions suggests that the standard that the government may not "use essentially religious means to serve governmental ends where secular means would suffice," *Abington School Dist.* v. *Schempp*, 374 U.S. at 231 (concurring opinion of Mr. Justice Brennan), would not be violated in this case even if aid to the secular functions of church-related colleges were considered an "essentially religious means."

included them under the Act because of the contribution they could make toward achieving secular goals. At the same time, it expressly excluded religious use of facilities which would be constructed, because such use would not help to meet these secular goals.

2. The Primary Effect of the Act Is to Achieve Its Secular Goal

The fundamental objection of appellants is to the effect of the Act. Grants for construction of buildings surely aid church-related colleges and universities just as "making textbooks available to pupils in parochial schools," in *Allen* assisted churches by relieving them "of an enormous aggregate cost for those books." *Walz* v. *Tax Commission,* 397 U.S. at 671–672. However, the *primary* effect of the challenged assistance, as the court below found, is to help in providing a secular education, just as the loan of secular texts in *Allen* had the primary effect of achieving that goal.

The problem in determining the primary effect of financial aid to church-related schools is that they "pursue two goals, religious instruction and secular education." *Board of Education* v. *Allen,* 392 U.S. at 245. The court below properly emphasized on the goal toward which the aid was directed. Finding that the aid was in fact used exclusively to assist the colleges in their secular capacity, the court held that the primary effect of the Act was secular and that any incidental benefits to their religious activities were constitutionally permissible. Cf. Choper, *The Establishment Clause and Aid to Parochial Schools,* 56 Cal. L. Rev. 260, 287–290 (1968).

Appellants do not dispute that aid is directed only at the overtly secular activities of church-related colleges. Nor do they contend that no church-related institution may receive aid. Their argument is that only those church-related institutions for which "the propagation, teaching or practice of religion" is so significant as to render them "sectarian" are constitutionally ineligible. The merit of this argument depends critically on the validity of one proposition: that religiosity so permeates the teaching of secular subjects at "sectarian" institutions that their religious and secular functions are inseparable. If this is true, it is contended that the primary effect of any aid, regardless of the function toward which it is directed, is the advancement of religion.

This proposition was suggested in the debate in Congress (109 Cong. Rec. 19474–75), and rejected. This Court recently rejected it in the context of elementary and secondary schools, relying upon the fact that a "wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education." *Board of Education* v. *Allen,* 392 U.S. at 248.

The prospect that the educational process at the college level is so permeated with religion that secular and religious functions cannot be treated separately seems even more remote than at the elementary and secondary level. The "affirmative, if not dominant,

policy" of church-related elementary and secondary schools is "to assure future adherents to a particular faith by having control of their total education at an early age." *Walz* v. *Tax Commission*, 397 U.S. at 671. The more mature student at the church-related college or university is obviously less susceptible to inculcation of religious beliefs by use of a controlled atmosphere "since either his basic religious personality has already been formed or it can be influenced successfully only by stimulating the student to acquire understanding and insight which persuade him to accept certain religious teachings." Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part II. The Nonestablishment Principle*, 81 Harv. L. Rev. 513, 583 (1968). See, also, Freund, *Public Aid to Parochial Schools*, 82 Harv. L. Rev. 1680, 1691 (1969). The more rigorous academic requirements at the college and graduate school level further insure against permeation of secular instruction and research with religious dogma. The various secular subjects impose their own discipline which precludes introduction of irrelevant religious viewpoints and fosters consideration of relevant religious matters in a spirit of free inquiry. As Senator Prouty declared in the debate in Congress, "[t]here is no such thing as a Catholic version of economics, a Jewish version of the Russian language, and a Protestant version of political studies." 109 Cong. Rec. 19487.

The evidence before the court below in this case demonstrates that secular activities of the appellee institutions were pervaded by an atmosphere of aca-

demic freedom rather than by one of religion. *E.g.*, App. 111–112. While appellants' original tactic was to demonstrate that these recipient institutions were sectarian, they now offer a hypothetical institution as the basis for decision (Appellants' Brief, pp. 10–11). Adjudication of the constitutionality of an Act of Congress on this basis is, however, singularly inappropriate. *United States* v. *Raines*, 362 U.S. 17, 21; *United States* v. *Petrillo*, 332 U.S. 1, 9–12.

There is, of course, wide variety among church-related institutions of higher learning. See, generally, Pattillo and MacKenzie, *Church-Sponsored Education in the United States* (1966). Unlike denominational elementary and secondary schools, the great majority of which are Roman Catholic, church-related colleges and universities are widely spread among faiths.[13] There are, moreover, differences in the degree of importance of religion at these institutions. The four appellee colleges may thus not be a fully representative sample. But they provide a better basis for this Court's review than a hypothetical institution the actual existence of which is vouchsafed only by appellants' assurance that they have "no doubt there are many." [14]

[13] See note 8, *supra*, p. 12.

[14] Appellants apparently offer as an alternative standard for determining whether financial assistance to church-related institutions would violate the Establishment Clause the "no subsidization" principle of *Everson* v. *Board of Education*, 330 U.S. 1, as limited by the "child-benefit" theory (Appellants' Brief, pp. 11, 16–20). Direct subsidies, such as those involved here, would not be constitutionally permissible. However, benefits provided in a religiously neutral manner to all children

B. THE ADMINISTRATION OF THE ACT DOES NOT EXCESSIVELY ENTANGLE GOVERNMENT IN THE RELIGIOUS AFFAIRS OF THE CHURCH-RELATED COLLEGES AND UNIVERSITIES

In addition to considering whether the purpose or primary effect of a governmental measure is impermissibly to advance or inhibit religion, it is necessary to determine whether it results in "an excessive governmental entanglement with religion." *Walz* v. *Tax Commission,* 397 U.S. 664, 674. The administrative relationships between government and religion at issue in this case are not excessive. They are surely no greater than those resulting from the loan of textbooks which this Court in *Allen* refused to declare an "unconstitutional involvement of the State with religious instruction." *Board of Education* v. *Allen,* 392 U.S. at 248. In fact, they approach the minimum involvements which are necessary to insure that aid to religious schools is employed in secular activities.

In *Walz,* where this Court recently applied the "excessive entanglement" standard with regard to governmental financial assistance to religion, it commented that

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or parents such as textbooks (*Allen*) or bus rides (*Everson*) which indirectly aid the church-related institution would be allowed. While the child-benefit theory may be helpful as one tool for analyzing the constitutional problems raised by certain programs, it should not substitute for a realistic examination of the effect—direct or indirect—of financial assistance. It ignores the fact that aid to either the school or the child assists both. Moreover, it does not provide a universally practical standard for limiting the no-aid principle of *Everson*, for virtually any aid can be cast in a form which aids the student directly and the school only indirectly.

"[o]bviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards." 397 U.S. at 675.

Although a direct subsidy is involved here, it is in the form of a specific, limited-purpose, one-time grant, which does not involve the kind of "sustained and detailed administrative relationships" to which the Court referred. The application process itself involves insignificant contact with the institution and none with its religious functions. The government's concern is only with the need and ability of the institution to expand its enrollment. Beyond obtaining the assurance that the facilities will not be used for religious purposes and making certain that the institution meets neutral criteria, such as that it is accredited, the government does not—and cannot by statute—become involved in "the personnel, curriculum, methods of instruction, or administration." 20 U.S.C. 757.

During the twenty-year period in which the government retains an interest in the facility, its contact with the institution is superficial and slight. The primary supervisory device is the on-site visit. Because only use of buildings is involved, compliance with the conditions of aid ordinarily may be determined by such methods as a physical tour and examination of class schedules (App. 82–83).

The alternative to this simple system which appellants' position requires would result in far greater

government involvement with religion. Since they do not contend that government may not aid any church-related college or university, it would become necessary to determine in each case whether an institution is nonsectarian and therefore eligible. The government would have to engage in a detailed examination of the institution and its relationship with its affiliated church.

Ranking institutions along a scale of sectarianism would not only be difficult but could lead to theological disputes among religious institutions competing for funds, which the government would inappropriately have to resolve. See *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440. It might have to inquire into the beliefs and religious affiliation of administrators, teachers and students, as appellants did at the trial in this case (*e.g.,* App. 109), and the instructional practices at the institution. Cf. *Sweezy* v. *New Hampshire,* 354 U.S. 234. A standard of sectarianism would, finally, place a premium on secularism, for it would create a financial incentive to de-emphasize religion in order to qualify for federal funds.

This Court refused to enter into comparable inquiries in *Walz,* where one argument for tax exemptions for churches was that they performed "social welfare services or 'good works' * * * family counselling, aid to the elderly and the infirm, and to children." 397 U.S. 674. Noting that churches varied in the extent of their social services, this Court concluded that "[t]o give emphasis to so variable an as-

pect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." 397 U.S. at 674. An across-the-board tax exemption, on the other hand, avoided these entanglements.[15] They are similarly avoided in this case by providing assistance to eligible colleges regardless of their religious affiliation, while insuring that the assistance will not be used for religious purposes.

C. THE ACT DOES NOT VIOLATE APPELLANTS' RIGHTS UNDER THE FREE EXERCISE CLAUSE

Appellants also claim that the Higher Education Facilities Act restricts their free exercise of religion, solely because it compels them to pay a tax allegedly for the support of religion. This claim is wholly in-

[15] Appellants contend that aid to church-related colleges, in contrast to tax exemptions, is not an historical tradition but an innovation. Appellants' Brief, pp. 48–50; see *Walz* v. *Tax Commission*, 397 U.S. at 678–680. However, Congress has permitted church-related institutions to participate in general aid programs to colleges and their students for more than a century, beginning with the Morrill Act which established land-grant colleges. 109 Cong. Rec. 19382–19383. In the period following World War II, Congress has established programs to provide aid for a variety of educational purposes. Funds are made available through the National Defense Education Act, the National Science Foundation, the National Institutes of Health, the Atomic Energy Commission and the National Aeronautics and Space Agency for equipment, fellowships, and research without distinguishing between public and private or church-related and non-church-related institutions of higher education. See 109 Cong. Rec. 19383–19384, 19402, 19478, 19885, 19890.

substantial, for it is well-settled that the Free Exercise Clause may only be invoked where there is some coercion in the practice or exercise of religion. *Board of Education* v. *Allen,* 392 U.S. 236, 248–249; *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 222–223. There is no such coercion in this case.

D. THE ACT FURTHERS VALUES FOSTERED BY THE FREE EXERCISE AND EQUAL PROTECTION CLAUSES

If Congress had decided to exclude church-related colleges and universities from the benefits of the Higher Education Facilities Act, a challenge by such institutions to the constitutionality of that exclusion on the basis of the Free Exercise and Equal Protection Clauses might have been made. As Senator Keating argued in the debate in Congress, "the constitutional question would be raised not by the inclusion of religiously owned or operated institutions, but rather by the exclusion of such institutions from a program of across-the-board assistance for higher education." 109 Cong. Rec. 19489. Cf. *Sherbert* v. *Verner,* 374 U.S. 398; *Torcaso* v. *Watkins,* 367 U.S. 488; Kauper, *Religion and the Constitution* 110 (1964). While we do not contend that inclusion of these institutions was required by these Clauses any more than it was forbidden by the Establishment and Free Exercise Clauses, we do believe that their inclusion was a wise legislative choice which advances the values that the concepts of freedom of religion and equal protection are designed to protect.

There are numerous examples of measures, neither compelled nor forbidden by the Religions Clauses, which benefitted religion when they were taken but might have harmed it if they had not been. In *Everson* v. *Board of Education,* 330 U.S. 1, 16, this Court stated that the State could include parochial students in its general program of free bus transportation to school or exclude them from it without transgressing constitutional bounds. The Court acknowledged that including them in the program lent some assistance to religion but also stressed that it furthered free exercise and was consistent with the principle of equal treatment. See, also, *Board of Education* v. *Allen,* 392 U.S. at 244; Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* 139 (1965). Similarly, the Constitution does not require States which have Sunday closing laws to exempt Sabbatarians, although it permits them to do so. *Braunfeld* v. *Brown,* 366 U.S. 599, 608 (opinion of Chief Justice Warren). Tax exemptions for churches were upheld as a valid measure, within the discretion of the legislature, which spares "the exercise of religion from the burden of property taxation." *Walz* v. *Tax Commission,* 397 U.S. 664, 673. See, also, *Zorach* v. *Clauson,* 343 U.S. 306, 314; *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 306 (concurring opinion of Mr. Justice Goldberg).

In this case, a decision by Congress to exclude church-related colleges from the Act would have

made achievement of the Act's goals of rapid expansion of college enrollment capacity more difficult. It would also have seriously weakened the ability of church-related schools to provide a quality education, or at least it would have reduced their relative importance among institutions of higher learning by channelling literally billions of dollars solely to non-church-related institutions.[16] The consequent creation of a permanent underclass of church-related colleges would have compelled students who preferred an education at such an institution to forsake their preference or the quality of their education. Cf. *Pierce* v. *Society of Sisters,* 268 U.S. 510. Congress chose wisely instead to honor the principles of free exercise and equal protection by including church-related colleges and simultaneously taking pains to guarantee that aid to them would be used only for secular purposes.

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[16] The first authorization was of $230 million for fiscal 1963, a figure which arose steadily each year to $936 million for fiscal 1970. 20 U.S.C. (Supp. V) 711(b).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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